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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. STEPHEN LAINE WELLS, Defendant/Appellant.	:	Case No. 950773-CA Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for attempted possession of a controlled substance, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1994), in the Third District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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IN THE UTAH COURT OF APPEALS

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In an effort to justify a specifically tailored warrantless search of areas in Defendant/Appellant Stephen Wells' ("Wells") home, the state has advanced two theories: First, the state asserts the warrantless search was proper under the federal and state constitutions as "incident to [Wells'] arrest"; second, the state asserts Wells failed to properly marshal evidence and preserve issues relevant to the "alternative exigent circumstances justification" for the search. Neither theory is capable of legitimating the activities of the officers in this instance.

Although the state called witnesses to testify in two separate hearings in the trial court, the state cannot, and has not, identified a single fact to support the determination that the areas searched were within Wells' "immediate control" or that the search was closely related in time to the arrest(s). In addition, the state fails to prove that exigent circumstances existed to justify the warrantless search.

ARGUMENT

POINT I. THE MARSHALED FACTS AND INFERENCES DO NOT SUPPORT JUSTIFYING THE SEARCH AS "INCIDENT TO ARREST."

In Chimel v. California, 395 U.S. 752 (1969), the United States Supreme Court ruled that a person's home may not be subjected to a warrantless search merely because he happens to be arrested there. It is, however, reasonable for an arresting officer to search the area into which an arrestee might reach in order to grab a weapon or evidentiary items, i.e. the area within the arrestee's "immediate control." Id. at 763. The warrantless search of areas in a home incident to arrest is justified if the state can show that certain temporal and geographical factors and exigent circumstances existed at the time of the arrest. Id. at 764; see also, Shipley v. California, 395 U.S. 818, 819-20 (1969) (disavowing *residential* search as "incident to arrest" where it was not confined to the immediate vicinity of the arrest); Vale v. Louisiana, 399 U.S. 30, 33 (1970); State v. Hygh, 711 P.2d 264, 272 n. 2 (Utah 1985) (Zimmerman, J., concurring) (limiting warrantless search to "an area within which a suspect could reasonably be expected to grab a weapon or destroy evidence"); State v. Ricks, 816 P.2d 125, 128 (Alaska 1991) (a search remote in time or place from arrest cannot be justified); (Appellee's Brief at 8).

In connection with the state's claim that the officers' search of Wells' home was "incident to arrest," the state ignores the exigency factor and disregards the lack of evidence concerning "immediate control" and temporal proximity. After two evidentiary hearings in the trial court on the matter, the state's witnesses presented testimony reflecting the following:

> Wells and his house-mate, Kelly Jensen ("Jensen"), resided in the basement apartment of a split level home.

(R. 54, 56, 62, 66-67; cited in Appellee's Brief at 9.)

Four officers crashed through glass doors of the upper-level dwelling, went down to the basement apartment, and arrested and handcuffed Wells immediately at the bottom of the stairs. (R. 65.) At the time officers handcuffed and arrested Wells, Jensen was in a closet in a "back room" of the basement apartment. (R. 65.)

Officers were assured immediately after Wells and Jensen were handcuffed, or contemporaneous therewith (see notes 5 and 9, infra), that "there wasn't anybody else in that entire house." "The house was empty." (R. 66, 164).

After officers found Jensen in the closet and arrested her, they moved her to another room and interrogated her. (R. 148-51 (Officer Gary Sterner ("Sterner") testified that he guarded Jensen and had discussions with her, and asked her "where the cocaine was").) In response to the questions, Jensen told officers about cocaine in the slit of a jacket lining and marijuana in a vacuum cleaner.[1]

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[1] The state asserts that "[b]ecause the marijuana charge, which was based on the marijuana recovered from the vacuum cleaner and bed [sic], was dismissed pursuant to the parties [sic] plea agreement . . ., the State narrows its response solely to the justification for the seizure of cocaine from defendant's jacket which is the basis for the conviction on appeal." (Appellee's Brief at 6 n.1.) However, in this matter, the conditional plea agreement was made pursuant to State v. Sery, 758 P.2d 935, 939 (Utah Ct. App. 1988), and Rule 11(i), Utah Rules of Criminal Procedure. Rule 11(i) states:

> With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

The trial court approved and the prosecution consented to appellate review of the issues specifically raised in the pre-trial Motion to Suppress (R. 100-06), including review of the legality of the warrantless search of the vacuum cleaner. Pursuant to Rule 11(i), Sery, and the plea agreement (R. 100), in the event Wells prevails on appeal, he may withdraw the plea. If he does so, the original charges (including the marijuana charge) will again be pending. Thus, Wells will be in the same position he was before the plea was entered, except that he and the state will have final appellate resolution on the pre-trial Motion to Suppress. A failure to reach the issue of whether the trial court erroneously denied the Motion to Suppress as it related to the warrantless search of the vacuum would deprive Wells of the benefit of a determination of that issue on appeal, as promised and guaranteed by the conditional plea bargain. In addition, it would constitute a breach of the plea agreement, providing Wells with grounds to withdraw the conditional plea,

(R. 50.) Jensen's statements to officers took place "while Wells was present." (R. 51, 56; cited in Appellee's Brief at 9.)

The officers conducted a second search that was narrower in scope than the prior sweep search. The officers focused on the areas identified by Jensen: the jacket lining and vacuum cleaner. (R. 52-53.)

Prior to the search of the jacket lining and vacuum cleaner, Jensen was in handcuffs and in officer custody in a bedroom (R. 148), the vacuum cleaner was located in a living room area (R. 150-51), and the jacket was located "on a bed" in a separate room in the basement-level apartment. (R. 66.) Jensen "took [Officer Russo] into the room" where the jacket was located. (R. 53.)[2]

Russo testified that when he searched the vacuum cleaner and assisted Sterner in searching the jacket lining, he was not sure where Wells was, but that he was in the basement, which had adjoining rooms. (See R. 53, 67.)

During the specifically tailored search, Wells was already arrested, handcuffed and in custody. (R. 65.)

According to the facts and inferences, the officers did not conduct the specifically tailored search contemporaneous with or in the

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and would render this entire appellate process useless.

Because the plea agreement concerns appeal of the issues specifically identified in the pre-trial Motion to Suppress, Wells has addressed the search of the vacuum cleaner. Since the state has failed to rebut the presumption that the search was unconstitutional, the trial court's ruling on that issue should be summarily reversed and an order entered granting the pre-trial Motion as it relates to the vacuum cleaner.

[2] As set forth in Wells' initial brief, although Jensen told officers where the contraband drugs could be found and "took" them to the drug locations, there is no evidence that she or Wells consented to a search of those areas. Evidence of consent must include clear and positive testimony that consent was unequivocal, specific, and freely and intelligently given, without duress or coercion, express or implied. State v. Webb, 790 P.2d 65, 82 (Utah Ct. App. 1990), aff'd, 853 P.2d 898 (Utah 1993); U.S. v. Mapp, 476 F.2d 67, 77-78 (2d Cir. 1973) (action in pointing to area where drug package was kept did not constitute consent). The record in this case contains no evidence whatsoever that officers requested or obtained consent to conduct the search. Rather, the record reflects that Jensen disclosed the location of the cocaine in response to the officers' questions. See State v. Harris, 671 P.2d 175 (Utah 1983), where admitting to growing marijuana does not mean defendant has consented to a search for it.

vicinity of Wells' and Jensen's arrests. In fact, the officers did not conduct a "search" per se; they simply went to the jacket and vacuum cleaner to seize drugs. The trial court summed up the evidence and challenge to the search as follows:

> What's being challenged is once the defendant was in custody, that is, handcuffed and in custody, what was it that then would allow or authorize the officers to go the step further of going into another location in the home to seize the drugs in question?

(R. 143.) The state's case lacks evidence concerning "immediate control," and the proximity in time between the arrest and search. Thus the "incident to arrest" exception is an improper basis for affirming the judgment in this matter.[3]

> A. THE STATE'S LACK OF EVIDENCE TO SUPPORT THAT WELLS WAS IN "IMMEDIATE CONTROL" OF THE JACKET AND VACUUM CLEANER REFUTES THE DETERMINATION THAT THE SEARCH WAS INCIDENT TO ARREST.

The state bears the burden of proving that the presumptively unreasonable search of the jacket and vacuum cleaner was valid under both the federal and state constitutions.[4] Thus, the state

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[3] The state incorrectly asserts that the trial court justified the "limited and contemporaneous" search of the vacuum cleaner and jacket as "incident to defendant's warrant-supported arrest on drug related charges." (Appellee's Brief at 6.) The phrase "incident to arrest" is found in the record in the Findings of Fact and Conclusions of Law Denying Motion to Suppress Evidence, which were prepared by the state ("Findings and Conclusions"). The Findings and Conclusions state (i) officers interrogated Jensen "incident to arrest" (R. 112) and (ii) under certain "exigent circumstances" warrant and warrantless arrests and searches "incident to arrest" are justified. (R. 113.) Although the trial court ultimately and erroneously determined "exigent circumstances" existed in this case, it did not validate the search of the jacket and vacuum cleaner as a contemporaneous incident of the arrest.

[4] See Katz v. Unites States, 389 U.S. 347, 357 (1967); Payton v. New York, 445 U.S. 573, 586 (1980) (warrantless searches and seizures inside the home are presumptively unreasonable); State v. Gardiner, 814 P.2d 568, 571 (Utah 1991) (recognizing warrantless searches are per se

was required to present to the trial court evidence concerning the area of "immediate control" to justify the search of those areas as incident to Wells' arrest. Where the state fails to present clear evidence to rebut the presumption, the warrantless search cannot be justified. See State v. Palmer, 803 P.2d 1249, 1253 (Utah Ct. App. 1990) ("This court cannot properly determine the outcome of a fact sensitive issue where the record below is not clear").[5]

1. A Search Incident to Arrest Is Restricted to the Room Where Officers Arrested the Defendant.

In the context of the "incident to arrest" exception, the Supreme Court in Chimel, 395 U.S. at 763, construed the phrase "area within [the arrestee's] immediate control" as follows:

> [T]he area from within which he might gain possession of a weapon or destructible evidence.
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed

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unreasonable under Art. I, sec. 14 of the Utah Constitution); State v. Harrison, 805 P.2d 769, 784 (Utah Ct. App. 1991) (burden is on the state to justify the search); State v. Northrup, 756 P.2d 1288, 1290-91 (Utah Ct. App. 1988).

[5] In the trial court the prosecutor apparently recognized that the evidence was not sufficiently clear to rebut the presumption (R. 88-89), and identified "additional particulars" allegedly relevant to the search in an effort to provide clarity. Although the prosecutor's "additional particulars" do not constitute evidence and in part are not supported by the record, they reflect that the state has believed, until now, that certain circumstances existed placing the search of the vacuum cleaner and jacket beyond the pale demarcated by Chimel and its progeny. Specifically, the prosecutor acknowledged that upon entering the premises the officers arrested Wells in a hallway and contemporaneous therewith conducted the sweep search; then officers arrested Jensen in the "baby's bedroom," secured her and moved her to "the larger masterbedroom." (R. 89.) Contrary to the state's assertions on appeal, the search of the vacuum cleaner and jacket occurred *after* the sweep search and in rooms other than where Jensen and Wells were arrested. The state appears to have raised the "incident to arrest" exception on appeal as part of a last-minute shift in tactics.

> areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

Id. In this matter officers searched through closed and concealed areas: the lining of the jacket and the vacuum cleaner. No "well-recognized" exceptions authorize such a search.

In addition, the officers searched areas in rooms "other than [those] in which the arrest[s] occurred." (R. 65 (officers arrested Wells at the bottom of the stairs near basement apartment entry), R. 148 (officers found Jensen in closet in "back room" and arrested her), R. 150-51 (Russo located vacuum cleaner in living room), and R. 53 (Jensen "took" officers to jacket on "a bed" in a separate room).) The warrantless search for evidence was not justified by any recognized exception and was therefore contrary to the Fourth Amendment. See State v. Austin, 584 P.2d 853, 856 (Utah 1978) (search restricted to single room where defendant arrested); State v. Farnsworth, 519 P.2d 244, 246 (Utah 1974) ("It is not to be doubted that when an accused is under arrest and in custody, a search made elsewhere would not ordinarily be justified as incident to the arrest"); State v. Cox, 200 N.W.2d 305, 309 (Minn. 1972) (search limited to bedroom were defendant arrested) (cited with approval in Austin, 584 P.2d at 856); People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 799, 300 N.E.2d 139, cert. denied, 414 U.S. 1033 (1973) (cited with approval in Austin, 584 P.2d at 856). The officers' seizure of drugs from closed and concealed areas in rooms other than where the arrests of Jensen and Wells occurred renders the search and seizure unconstitutional. See

State v. Johnston, 645 P.2d 63 (Wash. Ct. App. 1982) (after defendant's arrest in office, officers' warrantless search of purse found in closet was unconstitutional).

2. Police Cannot Circumvent the Fourth Amendment by Escorting the Arrestee to Other Rooms in the House in Order to Conduct a Search Incident to Arrest.

The state makes the ambiguous and meaningless assertion that Wells was "within several feet" of the jacket; therefore, the jacket was "within an area" of "immediate control." (Appellee's Brief at 9.) Since Wells and Jensen were not arrested in the rooms where the searched items were located, the distance of "several feet" must be as the crow flies, failing to take into consideration the walls and rooms between Wells, Jensen, and the items.

If the state is suggesting Wells was in the rooms where the items and/or Jensen were located, the necessary inference is that officers escorted Wells to those areas in order to search the specifically identified items as incident to Wells' arrest. Such a warrantless search is unconstitutional.

In U.S. v. Rothman, 492 F.2d 1260 (9th Cir. 1973), the defendant was arrested as he was about to board an airplane and was taken to a room at the airport, after which his checked luggage was retrieved from the plane and brought to the office where he was in custody. Officers searched the luggage in defendant's presence and confiscated evidence. The United States Court of Appeals for the Ninth Circuit ruled the search was not incident to the arrest: "The police cannot circumvent the Fourth Amendment's warrant requirement by arresting a person and then bringing that person into contact

with his possessions which are otherwise unrelated to the arrest." Id. at 1266; see also Shipley, 395 U.S. at 820 (the constitution has never been construed to allow the police, in the absence of an emergency, to arrest a person in one location and then take him to another location for the purpose of conducting a warrantless search); U.S. v. Wright, 577 F.2d 378 (6th Cir. 1978); U.S. v. Mason, 523 F.2d 1122, 1126 (D.C. Cir. 1975) ("Of course, Chimel, does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a 'search incident to the arrest'").

3. The Fact that Wells Owned the Jacket Does Not Per Se Validate the Search as Incident to Arrest.

The state has cited to a number of cases "uphold[ing] contemporaneous searches of an arrestee's clothing" as incident to arrest, as though such a search is per se reasonable. (Appellee's Brief at 9-10.) However, the cases cited by the state focus on the "immediate control" factor and are factually distinguishable from this matter. In State v. Parker, 337 S.E.2d 487 (N.C. 1985), the court upheld the search of the defendant's jacket as incident to arrest where the defendant was three or four feet from it and made a motion in front of officers toward it. "Additionally, when the defendant was taken to the sheriff's department he was allowed to wear the jacket." Id. at 489.

In Commonwealth v. Wheatley, 402 A.2d 1047 (Pa. 1978), officers obtained a warrant to search the defendant's premises based on probable cause that his house-mate was dealing in heroin. When officers executed the warrant, they found defendant at the

kitchen entrance, drug paraphernalia on the kitchen table, and defendant's jacket in front of him on the back of a kitchen chair. It appeared to the officers that the defendant and house-mate had been "shooting up." Id. at 1048-49. They arrested defendant on drug charges, searched the defendant's jacket and confiscated a handgun, which resulted in firearms charges against him. On appeal the court upheld the search on the basis that the jacket was sufficiently under the control of the house-mate and therefore permissible as part of the search conducted pursuant to the warrant, and as incident to arrest.

The court in State v. LeBlanc, 347 A.2d 590 (Me. 1975), recognized that a search incident to arrest must be limited to the area where the arrest occurred. The police in that case were called to an apartment where "strange goings on" were reported. When they arrived, they observed what appeared to be a burglary in progress, entered the apartment and asked the defendant for identification. He refused to cooperate. Because the officers believed they had interrupted a burglary, an officer went directly to the defendant's jacket for information concerning his identity or status as a burglar. The jacket was in defendant's full view, 8 to 10 feet away, and within his immediate control. In upholding the search the court stated:

> Regardless of this officer's subjective purpose, a reasonable and prudent police officer in these circumstances would have been justified in searching the area within which this still unrestrained defendant might obtain a weapon or destroy evidence of the crime of which the police had probable cause to believe him guilty.

Id. at 595.

In People v. Lyda, 327 N.E.2d 494 (Ill.Ct.App. 1975), the court upheld the search of the arrestee's jacket, which was hanging on a peg across the room. The arrest took place in a public area and the jacket, which belonged to defendant, could not be left behind. Thus, it was searched before it was returned to defendant.

The state also cites to New York v. Belton, 453 U.S. 454 (1981), as governing a residential search incident to arrest. In that case, a single officer engaged in a high speed chase, overtook the vehicle and four passengers, pulled the vehicle over, ordered its occupants out of the car, observed evidence of marijuana in plain view, arrested the four occupants, and searched them and the vehicle contemporaneous to the arrest. Id. at 455-56. The contemporaneous search yielded cocaine in Belton's jacket, and he moved to suppress it as evidence. On appeal, the United States Supreme Court upheld the search and adopted a bright-line test for automobile searches incident to arrest:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

Id. at 460. The Court cautioned that its ruling "does no more than determine the meaning of Chimel's principles in this *particular and problematic context*," thereby signaling the bright-line rule applies only in the context of vehicular searches and does not apply in the context of searching residential premises. Belton, 453 U.S. at 460; see also State v. Moreno, 910 P.2d 1245, 1247 (Utah Ct. App. 1996), cert. denied, Case No. 960094 (Utah April 23, 1996) (citing Belton as putting an end to confusion under Fourth

Amendment surrounding search of *automobiles* incident to arrest).

The facts and inferences in this case lack the indicia of "immediate control" identified in the cases cited by the state. Among other things, officers did not observe the jacket or vacuum cleaner in the rooms where the arrests occurred, they did not observe Wells motioning or lunging toward the objects, and they did not search the objects for objective purposes to check identification or so that Wells could take the items with him to the police station.[6] "Rather, the search had been made in order to find narcotics, which were in fact found." Chimel, 395 U.S. at 763.

4. The Area of "Immediate Control" Was Severely Restricted Where Wells and Jensen Were in Handcuffs and in the Custody of Four Officers.

The state claims that the fact that Wells was in custody, arrested and handcuffed during the search of the vacuum cleaner and jacket is irrelevant. (Appellee's Brief at 10.) Yet those factors are important in assessing two circumstances of the search: control and exigencies. The precise circumstance of the incident must be evaluated in determining the area within those premises which may be said to be within the arrestee's immediate control. Austin, 584 P.2d at 856 (the effect of putting handcuffs on the arrestee is a

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[6] Russo testified that sufficient time lapsed, between the time Wells ran downstairs to the time officers arrested him at the bottom of the stairs, to permit Wells to hide cocaine in the jacket and marijuana in the vacuum. (R. 52.) Such speculation is not sufficient to satisfy the "exigent circumstances" factor. See U.S. v. Salgado, 807 F.2d 603, 609 (7th Cir. 1986), cert. denied, 487 U.S. 1233 (1988) (the possibility without more that evidence will be destroyed if police take the time to obtain a warrant is insufficient to justify conduct). Even if Wells hid the drugs in that brief time period, it is unclear how Jensen knew to tell officers where the drugs were located since she was hiding in a closet. Further, the drugs were not in danger of being destroyed.

factor in determining the necessity for the search); U.S. v. Lyons, 706 F.2d 321, 330 (D.C. Cir. 1983) (the court must ask whether the area in question, was "conceivably accessible to the arrestee -- assuming that he was neither 'an acrobat [nor] a Houdini'?"); 3 Wayne R. LaFave, Search and Seizure § 6.3(c), 303-06 (3d ed. 1996).

The fact that an arrestee was in handcuffs supports the determination that the search of the nearby area was not within his immediate control. See U.S. v. McConnell, 903 F.2d 566, 570 (8th Cir. 1990), cert. denied, 499 U.S. 938 (1991) (search was illegal under incident to arrest doctrine where handcuffed suspect was unable to access briefcase); U.S. v. Bonitz, 826 F.2d 954, 956 (10th Cir. 1987); U.S. v. Baca, 417 F.2d 103, 105 (10th Cir. 1969), cert. denied, 404 U.S. 979 (1971); U.S. v. Cueto, 611 F.2d 1056, 1062 (5th Cir. 1980).

In addition, because Wells and Jensen were taken into custody by four officers, the area of possible reach and control was considerably limited. It was unlikely Wells and Jensen could get by four officers in order to gain access to and control over the jacket and vacuum cleaner in other rooms. See State v. Ricks, 816 P.2d 125 (Alaska 1991) (defendant would have to get by two officers to get to his jacket placing it out of his "immediate control"); People v. Bishop, 377 N.E.2d 585, 588 (Ill. Ct. App. 1987); State v. Cook, 332 S.E.2d 147, 154-55 (W.Va. 1985) (search of top of dresser improper after 2 of 3 arrestees handcuffed and all 3 seated on bed with shotguns pointed at them); U.S. v. Hill, 730 F.2d 1163, 1167-68 (8th Cir. 1984), cert. denied, 469 U.S. 884 (1984) (three officers in immediate area surrounding defendant restricted area of

"immediate control"); U.S. v. Mapp, 476 F.2d 67, 79-80 (2d Cir. 1973). The state has failed to satisfy the "immediate control" factor in this case.

With respect to the exigency factor, officers in this matter never articulated concerns for safety or the preservation of evidence (Appellee's Brief at 15 ("no deputy expressly testified that he was concerned for his safety")). To the extent the facts imply such concerns existed at the time of the arrests, officers put them to rest with a sweep search that left them empty-handed and assured them "the house was empty." (R. 66.) The officers' search should have ended there, as set forth in Maryland v. Buie, 494 U.S. 325 (1990):

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in Terry and Long, and as in those cases, we think this balance is the proper one.
>
> We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

Id. at 335-36. In this matter, sometime after the arrests officers went directly to the vacuum cleaner and jacket to confiscate evidence, plain and simple. Since officers had already assured

themselves during the sweep search that the house was empty, an additional search of other areas of the house was unjustified. To permit otherwise would render the protections of the Fourth Amendment as articulated in Chimel and Buie a nullity.

B. THE STATE HAS NO EVIDENCE CONCERNING THE PROXIMITY IN TIME BETWEEN THE SEARCH AND THE ARREST.

The state presented no evidence in the trial court to support a determination that the search was closely related in time to Wells' and/or Jensen's arrests. This Court has held in Fourth Amendment cases concerning warrantless searches incident to arrest that the search must be a contemporaneous incident of the arrest to be valid. State v. Moreno, 910 P.2d at 1245; State v. Harrison, 805 P.2d 769 (Utah App. 1991) (contemporaneous to arrest, a diaper bag was searched). The record in this case reflects only that the search was made. Where the state fails to present evidence to rebut the presumption that the warrantless search was unreasonable, it cannot be justified. See Palmer, 803 P.2d at 1253.

C. THE STATE CONSTITUTION PROVIDES ADDED PROTECTION FROM WARRANTLESS SEARCHES CONDUCTED BY POLICE.

Art. I, sec. 14 of the Utah Constitution is identical in part to the Fourth Amendment of the federal constitution, but is given more force. See State v. Larocco, 794 P.2d 460, 465-68 (Utah 1990); accord, State v. Gardiner, 814 P.2d 568, 571 (Utah 1991); State v. Thompson, 810 P.2d 415, 416-17 (Utah 1991).[7] As a result

[7] The majority of the Utah Supreme Court has supported at various times analyzing Art. I, sec. 14 in a manner separate from the Fourth Amendment in order to provide the citizens of Utah with greater,

of "some of the confusing exceptions to the warrant requirement that have been developed by federal law in recent years," Larocco, 794 P.2d at 469, the Utah Supreme Court has adhered to the "concept of expectation of privacy as a suitable threshold criterion for determining whether article I, section 14 is applicable. Then if article I, section 14 applies, warrantless searches will be permitted *only where they satisfy their traditional justification, namely, to protect the safety of police or the public or to prevent the destruction of evidence.*" Id. at 469-70.

Although Larocco concerns the warrantless search of an automobile, the same if not greater "threshold criterion" and "traditional justifications" must apply before a warrantless search

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predictable protections against unreasonable searches and seizures. See Justice Durham's plurality opinion in Larocco, 794 P.2d at 461, 473, joined by Chief Justice Zimmerman; Chief Justice Zimmerman's concurring opinion in State v. Anderson, 910 P.2d 1229, 1239 (Utah 1996) ("I must point out that the lead opinion's directive to Utah courts to construe article I, section 14 of the Utah Constitution in a manner similar to constructions of the Fourth Amendment except in compelling circumstances is not supported by a majority of this court and is not Utah law . . . [I] fault the lead opinion for blindly adhering to federal precedent on this [search and seizure] issue"); and Justice Howe's lead opinion in Thompson, 810 P.2d at 416 (interpreting Article I, section 14 to provide greater protections against unreasonable searches and seizures than federal counterpart). Associate Chief Justice Stewart concurred in the result in Larocco, but provided no insight into his rationale. See State v. Poole, 871 P.2d 531, 536 (Utah 1994). Notwithstanding, Associate Chief Justice Stewart embraces the court's responsibility to independently interpret Utah constitutional provisions:

> If this Court were to view its constitutional duty to construe the provisions in the Utah Declaration of Rights in the exact same manner as the United States Supreme Court construes analogous provisions in the Bill of Rights, we would violate the spirit and intended effect of Utah constitutional law and policy as established by the framers of the Utah Constitution.

Anderson, 910 P.2d at 1240. But see id. at 1235 (Justice Russon: "Although we are obligated to provide a state law review, such an independent analysis is not necessarily a *different* analysis").

of a home will be upheld. "[T]here is a significant difference between an exigent circumstances analysis involving an automobile and one involving a private residence. In their own homes, citizens enjoy a 'heightened expectation of privacy.'" State v. South, 885 P.2d 795, 799 (Utah Ct. App. 1994).

To that end, and as a preface to Larocco, Chief Justice Zimmerman suggested the following in considering warrantless searches of premises:

> One way to improve [the contradictory and confusing rationalizations and distinctions under federal law] might be to sharply limit the sweep of exceptions to the warrant requirement that often raise questions of police overreaching. In their place, clear-cut rules could be adopted -- for example, a flat requirement that a warrant must be obtained before any non-consensual search of property not in the immediate physical control of a suspect is conducted. Such a rule would be an improvement over present law, both for the individual and for the police. The individual would be assured that, in most cases, his property would not be searched or seized unless the reasons for the search or seizure have first been presented to a neutral magistrate and a warrant issued. At the same time, police officers would not be forced to speculate about what may or may not be subject to search without a warrant. Warrantless searches would be permitted only where they satisfy their traditional justification -- to protect the safety of officers or to prevent the destruction of evidence. Once the threat that the suspect will injure the officers with concealed weapons or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant. Such a requirement would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute, U.C.A., 1953, § 77-23-4(2).

State v. Hygh, 711 P.2d 264, 272 (Utah 1985) (Zimmerman, J., concurring) (footnotes and cites omitted).

Art. I, sec. 14 is the principal protection under the Utah Constitution against unnecessary intrusions into private dwellings.

At a minimum, the state must be required to show that probable cause and articulable exigent circumstances existed at the time of the search to justify the conduct.[8] See State v. Northrup, 756 P.2d 1288, 1290 (Utah Ct. App. 1988). "[T]he need for an immediate search must be apparent to the police, and so strong as to outweigh the important protection of individual rights provided by the warrant requirement." State v. South, 885 P.2d 795, 799 (Utah Ct. App. 1994) (quoting State v. Beavers, 859 P.2d 9, 18 (Utah Ct. App. 1993).

Other states have rejected federal cases developing the "incident to arrest" exception under the Fourth Amendment, and have ruled that under state constitutional provisions, officers must be able to point to specific and articulable facts that an exigency existed to support a warrantless search. See also, State v. Barrett, 701 P.2d 1277, 1281 (Haw. 1985); People v. Gokey, 457 N.E.2d 723, 724-25 (N.Y. 1983) (marijuana recovered from arrestee's bag was suppressed in the absence of exigent circumstances to justify search).

The evidence before this Court refutes, among other things, the existence of an articulable exigency *at the time of the search*

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[8] The warrantless search exception articulated under Art. I, sec. 14 is different from the federal "incident to arrest" exception in at least one basic respect: the federal exception takes into consideration the probable cause and exigent circumstances existing *at the time of the arrest*. Notwithstanding the difference, the exception under Art. I, sec. 14 satisfies police concerns for safety and the preservation of evidence, while simplifying the confusion developed under the federal "incident to arrest" analysis, where courts justify a search even when handcuffs are firmly fastened on the defendant, who has been removed from the automobile or to some distant part of the room or house, and there is no likelihood that the defendant will reach the area in question.

as mandated by Larocco. (See Appellant's Brief, dated 2/28/96, at 18-24.) Thus, even if the search may be justified under the federal constitution as reasonable, there is no persuasive reason why, under Art. I, sec. 14, the officers could not have taken the time to secure a warrant.

POINT II. THE STATE FAILED TO IDENTIFY THE "EXIGENT CIRCUMSTANCES" TO JUSTIFY THE SEARCH UNDER THE SEPARATE "PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES" EXCEPTION.

The state next claims that Wells' challenge to the search under the "exigent circumstances" exception fails for three reasons: (1) Wells allegedly failed to marshal Russo's testimony and the trial court's express finding "that the deputies were not able to determine that no individuals other than [Wells] and [Jensen] remained in the apartment until sometime after the arrests" (Appellee's Brief at 13-14); (2) exigencies existed to justify the forced entry and arrest (id. at 14); and (3) "deputies were reasonably concerned for the possible destruction of suspected narcotics" (id. at 15).

With respect to the first point, the trial court's "express finding" is not supported by Russo's testimony, which reflects that a sweep search was conducted immediately after Wells was arrested and cuffed.[9] The state completely disregards that evidence. Even

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[9] According to Russo, the sweep search was conducted immediately after the officers arrested Wells:

ATD [Counsel for Wells]: Who was in the room when [Wells] was arrested? Cuffed?
A [Russo]: Those three additional officers.
ATD: Okay. And was [Jensen] already cuffed by then?
A: [Wells] was cuffed first and [Jensen] was in the back room. So probably no.

if officers waited to make the sweep search until sometime after the arrests, as suggested by the state, they could not use that search to confiscate drugs from the jacket and vacuum cleaner. The protective sweep would be aimed only at protecting the arresting officers, Buie, 494 U.S. at 335-36; it is unreasonable to infer that officers believed the jacket and vacuum cleaner were "spaces where a person may be found." Id.

With regard to the second point, the circumstances leading up to the arrest are irrelevant since the probable cause and exigent circumstances exception takes into account the circumstances at the

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ATD: So as far as you know he was in handcuffs as soon as you could get him in handcuffs . . .?
A: Yes.
ATD: . . . upon making entry?
A: Yes.
ATD: There wasn't any stopping to chit chat, or look for anything, or look around.
A: No. We had to gas the dog because the dog bit Sterner.
ATD: And other than that -- was he in handcuffs at the time the dog bit?
A: No, we were trying to get to him.
ATD: Okay. So immediately after the dog bite, that's when he gets cuffed?
A: Yes.
ATD: Okay. And there wasn't anybody else in that entire house, correct?
A: Yes.
ATD: At that time?
A: Correct.
ATD: The house was empty.
A: Correct.

(R. 65-66.) In addition, the trial court examined Russo on that point:

THE COURT: Deputy Russo, there was an indication when you made entrance into the home that it was subsequently determined that the home contained only two occupants, those who were arrested?
THE WITNESS: Yes, sir.
THE COURT: When was the determination that those were the only two occupants of the home made, before or after the defendant was placed in handcuffs?
THE WITNESS: After.

(R. 164.)

time of the search. See State v. South, 885 P.2d 795, 798-99 (Utah Ct. App. 1994) (considering probable cause factor in conjunction with search); State v. Clark, 654 P.2d 355, 360 (Haw. 1982) (considerations relate to search).

In order to justify a warrantless search under that exception, the circumstances must lead officers to conclude that there is no time to obtain a search warrant. In this case officers had already effected the arrest warrants. Consequently, the events leading up to and ending with the execution of those warrants (Wells fleeing downstairs while pulling something from his pocket; deputies requesting entry and breaking glass door; the attack by the dog and subsequent gassing of the dog prior to Wells' arrest) are irrelevant. In addition, the officers conducted a sweep search. Thus, the execution of the arrest warrant and the subsequent sweep search insulate the prior "exigencies" from the second, subsequent, warrantless search of discreet areas. See U.S. v. Irizarry, 673 F.2d 554, 559 (1st Cir. 1982) (after defendants were arrested and a security sweep of room had been completed, no further exigency justified search of area above drop ceiling in bathroom); Finch v. State, 592 P.2d 1196 (Alaska 1979); Kwok T. v. Mauriello, 401 N.Y.S.2d 52, 56-57, 371 N.E.2d 814 (1977) (after police had arrested defendant and had information concerning location of evidence, police had no reason to believe evidence would be removed or destroyed prior to obtaining a warrant). Once Wells and Jensen were arrested there was no persuasive reason why the officers could not take the time to secure a warrant.

With regard to the third point, as acknowledged by the state, nothing in the record supports the determination that exigent circumstances existed (Appellee's Brief at 15). In fact, officers conducted a sweep search to placate safety concerns. With respect to the destruction of evidence, unlike the agents in State v. Ashe, 745 P.2d 1255, 1260 (Utah 1987), officers in this matter did not hear "the sound of a flushing toilet," Ashe, 745 P.2d at 1260, leading them to believe "defendant was attempting to destroy suspected narcotics." (Appellee's Brief at 15.) Since the "goods ultimately seized were not in the process of destruction," the search on that basis cannot be justified. Vale v. Louisiana, 399 U.S. 30, 35 (1970). The state has failed to identify exigent circumstances to rebut the presumption that the warrantless search was unreasonable.

POINT III. WELLS PROPERLY PRESERVED AND HAS PROPERLY RAISED IN THIS APPEAL THE ISSUE OF THE OFFICERS' ABILITY TO OBTAIN A WARRANT IN DETERMINING THE UNREASONABLENESS OF THE SEARCH.

Finally, the state asserts Wells did not sufficiently raise the issue concerning the officers' failure to show they were unable to obtain a telephonic search warrant. (Appellee's Brief at 16.) The state claims that the issue was "only nominally challenged" in a footnote, when in fact trial counsel identified Utah law applicable to obtaining telephonic warrants (R. 43 and 45), and argued during the hearing on the pre-trial Motion to Suppress that under the circumstances officers "could have easily secured the area and done a telephonic search warrant, let a magistrate decide

if [probable cause existed]." (R. 141.)

The state has overlooked the issues raised in the record, and has overstated the breadth and purpose of the waiver doctrine:

> The requirement of a specific objection on the record ensures that the trial court will understand the basis of the objections and have an opportunity to correct any errors before the case goes to the jury.

Hansen v. Stewart, 761 P.2d 14, 16 (Utah 1988); Utah County v. Brown, 672 P.2d 83, 85 (Utah 1983) ("[I]n order to preserve a plea of error, the alleged error must have been raised seasonably by counsel to the trial court . . . to allow the trial court to correct any error, if error there be"); Wurst v. Dep't of Employment Sec., 818 P.2d 1036, 1039 (Utah Ct. App. 1991) (issue sufficiently raised where mentioned in letter to department which served as appeal of A.L.J.'s decision).

In this case, the preservation concerns have been served. The trial court was apprised of the fact that officers failed to seek the issuance of a warrant via telephone and of the need to have a magistrate decide the issues. The trial court also was apprised of Utah law bearing on that issue. The trial court was given the opportunity to rule on the matter and ruled that the Motion to Suppress was denied. The issues surrounding the state's failure to obtain a search warrant via telephone were not raised "for the first time in this Court" as asserted by the state. (Appellee's Brief at 17.) While the basis for requiring such a warrant was not spelled out in the same manner as on appeal, the issues were clear and obvious: The telephonic search warrant provisions of Utah Code Ann. § 77-23-4(2) (1993) renumbered as § 77-23-204(2) (1995) were

available to and should have been utilized by the officers in order that a magistrate could determine whether a search warrant could be issued in accordance with the federal and state constitutions. (R. 43, 45, 141.) The officers failed to seek issuance of a such search warrant. The matter must now be resolved on appeal.

CONCLUSION

Based on the foregoing, Wells respectfully requests that this Court reverse the trial court's ruling on the Motion to Suppress.

SUBMITTED this 12th day of June, 1996.

Linda M. Jones

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CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 12th day of June, 1996.

LINDA M. JONES

DELIVERED this _____ day of _____, 1996.